Nos. 13 & 14 Orig.

Brf. of Attorney General (Conrad & Pradt) for Petitioner.

Filed Dec 24, 1900.

Office Supreme Court U.S.
FILED
DEC 24 1900
JAMES H. MCKENNEY
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 13, Original.

EX PARTE: IN THE MATTER OF THE DISTRICT OF COLUMBIA, PETITIONER.

No. 14, Original.

EX PARTE: IN THE MATTER OF THE DISTRICT OF COLUMBIA, PETITIONER.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

STATEMENT.

These are applications for writs of mandamus to the Court of Claims to proceed with and determine motions for new trials. The motions are made upon the same conditions of facts, which are set up in the petitions.

Thomas Kirby (No. 13 original) and Cranford & Hoffman (No. 14 original) brought suits in the Court of Claims,

pursuant to the provisions of the act of Congress entitled "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes," approved June 16, 1880 (c. 243, 21 Stat., 284). The suit of Kirby was dismissed for want of prosecution. The suit of Cranford & Hoffman proceeded to trial, and judgment was rendered for claimants for the sum of $7,385.60, as due and payable January 1, 1876. This judgment, principal and interest, was paid in 1885 at the Treasury.

Thereafter Congress duly passed an act, approved February 13, 1895 (c. 87, 28 Stat., 664), as follows:

> That in the adjudication of claims brought under the provisions of the act entitled "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes," approved the sixteenth of June, eighteen hundred and eighty (Twenty-first Statutes at Large, page two hundred and eighty-four), the Court of Claims shall allow the rates established and paid by the board of public works; and whenever said rates have not been allowed the claimant or his personal representative shall be entitled, on motion made within sixty days after the passage of this act, to a new trial of such cause.

The said claimants filed their several motions for new trials, which were allowed; and such proceedings were had thereon that the Court of Claims gave judgments in favor of the claimants and against your petitioners for amounts due and payable January 1, 1876. No new

trials under said act after these latter judgments were prayed; no appeals from said judgments were taken in proper time.

The judgments, principal *and interest*, were paid, as under the act of 1880.

After these judgments and satisfactions, other suits of a like nature by other claimants against your petitioner were tried under the said act of February 13, 1895, and judgments rendered exactly similar to the judgments above mentioned; but from these judgments appeals were taken by the defendant, your petitioner, to the Supreme Court. The question raised and argued and decided was as to the correctness of the allowance of interest upon the amounts found due from your petitioner. This court determined that no interest was due upon such amounts until after the passage of the act of February 13, 1895. (*District of Columbia* v. *Johnson*, 165 U. S., 330.)

Subsequently, and within two years from the date of the above-mentioned judgments against your petitioner in favor of said claimants, your petitioner filed motions for new trials under section 1088 of the Revised Statutes, which provides:

> The Court of Claims, at any time while any claim is pending before it, or an appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is

made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

These motions were, each, as follows:

MOTION FOR A NEW TRIAL.

Now comes defendant, The District of Columbia, by the Attorney-General of the United States, and moves the court to set aside the judgment entered in this cause on the 10th day of June, A. D. 1895 (the other, the 18th day of November, A. D. 1895), and to grant a new trial herein, for the following reasons, viz:

I.

For error in the court, in this: That the court gave judgment for claimant as due and payable January 1, 1876, the effect of which was to give interest upon the amount of said judgment from that date, whereby great wrong and injustice was done to the United States and the District of Columbia.

II.

For error in the court in adjudging that the amounts allowed became due and payable before the granting of the judgment herein, whereby wrong and injustice was done to the United States and the District of Columbia.

J. E. DODGE,
Assistant Attorney-General.

After argument and consideration the said Court of Claims refused to entertain said motions, and dismissed the same by an indorsement on the motion, as follows: "Overruled, the court having no jurisdiction to con-

sider the same. The statute under which the suit was brought requires motions for new trial to be made within twenty days from the rendition of the judgment, as follows: 'That motions for new trials shall be made by either party within twenty days after the rendition of any judgment. (Act of June 16, 1880, 21 Stat. L., 285.)'"

Your petitioner on May 14, 1900, applied for leave to file petitions for writs of mandamus requiring the Court of Claims to hear and determine said motions; which leave was granted on May 28, 1900, and a rule to show cause was directed to said judges. To the rule the judges have made the following return, which is the same, *mutatis mutandis*, in each case, and is as stated in the petition:

Supreme Court of the United States.

October Term, 1900.

No. 14, Original.

Ex parte: In the matter of the District of Columbia, petitioner.

RETURN TO RULE.

Court of Claims.

In the matter of the petition of the District of Columbia for a writ of mandamus in the case of Cranford and Hoffman *v.* said District, decided on the 18th day of November, 1895, in which a judgment was rendered against said District on said day.

To the Supreme Court of the United States:

The chief justice and judges of the Court of Claims, in answer to a rule of the Supreme Court, made on the 28th day of May, 1900, to show cause why a writ of mandamus should not issue as prayed for, answering, say: That on the 25th day of February, 1897, the petitioner filed a motion for a new trial, as set forth in the petition herein, and on the 19th day of March, 1900, the matter then having been brought to the notice of the Court, after argument and consideration by the court, said motion was overruled by the court in an indorsement on the same, as follows, to wit:

"Overruled: The court having no jurisdiction to to consider the same. The statute under which the suit was brought requires motions for new trials to be made within twenty days from the rendition of the judgment, as follows: 'That motions for new trials shall be made by either party within twenty days after the rendition of any judgment. (Act of June 16, 1880; 21 Stat. L., 285.)'"

In testimony whereof the chief justice and judges have hereunto set their hands this 30th day of November, A. D. 1900.

[SEAL.]

CHARLES C. NOTT.
LAWRENCE WELDON.
STANTON J. PEELLE.
CHARLES B. HOWRY.

(Indorsed): Supreme Court U. S., October term, 1900. Term No. 14, Original. Ex parte: In the matter of the District of Columbia, petitioner. Return to rule. Filed Dec. 5, 1900.

The question squarely presented by these pleadings is, whether the law of section 1088, Revised Statutes, as to these cases, has been abrogated and repealed by the proviso in section 4 of the act of June 16, 1880.

ARGUMENT.

By the organic act of February 24, 1855 (C. 122, 10 St., 612), and the amendatory act of March 3, 1863 (C. 92, 12 St., 765), carried into section 1070, Revised Statutes, it is provided that the Court of Claims "shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law."

By the same act of February 24, 1855, section 9, carried into section 1087, Revised Statutes, it is provided:

> When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

Rules of court have been promulgated, from time to time, regulating the granting of new trials under this statute.

In neither the jurisdictional statute nor the rules is any mention made of a new trial on the part of the United States. But, under the plenary power to establish rules for the regulation of practice, and to exercise such powers as are necessary to carry into effect the powers granted to it by law, the court could grant a new trial upon the application of the Government for any of the grounds so amply covered by the statute. And where there was made manifest, in proper time, say at the term at which the judgment was rendered, a mistake

in law or a properly shown case of newly discovered evidence, the court would unquestionably vacate the judgment and grant the new trial to the United States.

This need not be dependent upon any direct statutory enactment as to new trials nor upon any rule before published.

> It is not essential that any court in establishing or changing its practice should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court.
>
> How can the practice of the court be better known or established than by its own solemn adjudication upon the subject? (*Duncan* v. *United States*, 7 Pet., 435, 451; *United States* v. *Halstead*, 10 Wheat., 55, 61.)

In any matter that arose before it, in this regard, the court would observe the same rule of procedure, whether an application for new trial was made by the claimant or the defendant. The right, established by the statute to the claimant, would be recognized by every court as inuring to the other party, in all individual cases, unless expressly prohibited. It will be observed hereafter that it would absolutely be retained to the sovereign.

This grant of power is the same as that given to the courts of the United States ever since the judiciary act of 1789. Congress has enabled the courts to regulate their practice by that and subsequent laws. These are found in the Revised Statutes, sections 917 and 918, and in all statutes since, constituting courts and providing for additional jurisdictions. The authority and propriety of these laws has been recognized and determined by uni-

form decisions of this court. (*Wayman* v. *Southard*, 10 Wheat., 1; *Bank of the United States* v. *Halstead*, id., 51; *Ex parte Boyd*, 105 U. S., 651; *Fink* v. *O'Neil*, 106 U. S., 278; *Russell* v. *McLellan*, 3 Wood & M., 157, and numerous other cases.

This power to regulate practice may be exercised by Congress itself or delegated to the courts. In truth it has been partially done by the legislature and partially delegated to the courts in many cases. Chief Justice Marshall, in the case of *Wayman* v. *Southard* (*Sup.*), said:

> The seventeenth section of the judiciary act, and the seventh section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts, yet it is not alleged that the power may not be conferred on the judicial department.

Consequently, in continuation of this habitual manner of legislation, when Congress conferred upon the Court of Claims, by act of June 16, 1880, jurisdiction of claims against the District of Columbia (c. 243, 21 Stat., 284), it was enacted in the third section that the Attorney-General is authorized to defend the District of Columbia, with the same power to interpose counter claims and offsets against claims and defenses for fraud practiced or

attempted, and all other legal defenses, and with like power of appeal, as in cases against the United States tried in said court. And by the fourth section: All laws now in force relating to prosecutions of claims against the United States in the Court of Claims shall apply, as far as applicable, to the prosecution, practice, hearing, and determination of claims against the District of Columbia authorized to be prosecuted under the provisions of this act: Provided, That motions for new trials shall be made by either party within twenty days after the rendition of any judgment.

The motions for new trials mentioned in this proviso are the motions for new trials made in accordance with the modes of procedure at common law and provided for in the statutes and in the rules governing practice. Before this enactment the application for the new trial could have been made at any time during the term. The proviso requires it to be made within twenty days from the rendition of the judgment. This verbiage is upon the recognition that the Court of Claims, by rule prescribed by the Supreme Court (Rule 4, Court of Claims), is required to make and file their findings of facts and conclusions of law thereon in open court before or at the time they enter the judgment in the case. The verdict and the judgment run *pari passu*. In the district and circuit courts the rules generally provide that these motions shall be made within so many days after verdict. Here it is after judgment. This distinction is observed by what was said by Mr. Justice Brewer in delivering the opinion of the court in *Belknap* v. *United States* (150 U. S., 588, 590).

II.

But these motions for new trials, in the cases now before this court, were made under an entirely different statute. It is again noted that, prior to the passage of the act under which these motions for new trial were made, no statute nor written rule had provided for motions for new trials by the United States in suits brought against them in the Court of Claims. And further, the right of appeal was limited. The act of 1863 provided:

> That either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said Supreme Court may direct. (Sec. 5, ch. 92, 3d sess., 1863, 12 St., 766.)

By the act of June 25, 1868 (c. 71, 15 St., 75), it was enacted:

> SECTION 1. That an appeal to the Supreme Court of the United States shall be allowed on behalf of the United States from all the final judgments of the said Court of Claims adverse to the United States, whether such judgments shall have been rendered by virtue of the general or any special power or jurisdiction of said court under the limitations now provided by law for other cases of appeal from said court.
>
> SEC. 2. That said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any such suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim and stay the

payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment the same shall be payable and paid as now provided by law.

Section 1 is section 707 of the Revised Statutes. Section 2 is section 1088 of the Revised Statutes.

These sections confer privileges and advantages upon the Government which are denied to the claimants. They are rules of practice established by the legislature, and therefore deemed necessary to protect the Government. They are to be given full construction, being conditions upon which, with others, claimants are permitted to sue the sovereign in its own courts. Immunity from suit is a prerogative of the National Government. That Government can be sued only in the manner and under the limitations permitted and prescribed by it. And when once extraordinary provisions for its protection have been enacted those provisions remain in force, and must be applied in all cases, unless expressly, or by irresistible implication, abrogated or waived.

There is also involved the familiar rule that the interpretation of a statute shall be such, if possible, as to avoid any repugnancy or inconsistency between it and other enactments of the same legislature. The provisions of section 1088 are applicable to the cases mentioned in the petitions for writs of mandamus, *first*, because by acts of Congress (c. 182, 20 St., 377, 410; c. 243, 21 St., 284; c. 134, 21 St., 458, 466) the United States has to pay a

moiety of judgments rendered against the District of Columbia under the act of 1880; and *second*, because these provisions are carried into the jurisdictional statute of 1880 (*ut sup.*) by sections 3 and 4. These subjects were fully considered by this court in *Johnson* v. *District of Columbia* (165 U. S., 330), and there is no repugnancy between this section 1088 and the proviso in section 4. The latter refers to the common-law proceeding of a new trial; the former to a distinct, peculiar, anomalous proceeding, wholly different in its characteristics from the usually designated new trial.

III.

But these motions are not made under the act of 1880. Kirby (No. 13) brought suit under that act, which was dismissed for want of prosecution. He made a motion for new trial under the act of February 13, 1895, which was allowed by the Court of Claims, upon the reasoning of *Follansbee* v. *District of Columbia* (32 C. Cls. R., 187). Upon this trial he obtained the judgment recited in the petition. Similarly, except that they had obtained a first judgment under the act of 1880, Cranford & Hoffman (No. 14) obtained a further judgment under the act of 1895. Now, there is no proviso in the act of 1895, limiting the time for making a motion for new trial after a judgment under that act. Of course, for legal grounds, that motion could be made by either party. If it could be maintained that the proviso in the act of 1880 repealed and abrogated the section 1088, yet, upon what principle can it be written into

the act of 1895? That would be a repeal by an implication upon an implication. Section 1088 was deliberately enacted for the safeguard of the Government. It can not thus be set aside.

But section 1088 is a good deal more than a motion for a new trial. Mr. Justice Brewer, speaking for this court, in *Belknap* v. *United States* (*sup.*), says:

> In order to give full effect to this statute the Court of Claims must have power to grant a new trial at a term subsequent to that at which the judgment was rendered, for it explicitly provides that it may be exercised at any time within two years. This section has been before the court in several cases, and in them its scope and effect considered and determined. *United States* v. *Ayres*, 9 Wall., 608; *United States* v. *Carsall*, 12 Wall., 175; *Ex parte Russell*, 13 Wall., 664; *Ex parte United States*, 16 Wall, 699; *United States* v. *Young*, 94 U. S., 258; *Young* v. *United States*, 95 U. S., 641, 642, 643.

In *Ex parte Russell* (*sup.*) the court, by Mr. Justice Bradley, said:

> But whatever reason Congress may have had for passing the act, of its right to pass it there is no question. The erection of the Court of Claims itself, and the giving to parties the privilege of suing the Government therein, though dictated by a sense of justice and good faith, were purely voluntary on the part of Congress; and it has the right to impose such conditions and regulations in reference to the proceedings in that court as it sees fit.
>
> The section in question was undoubtedly intended to give the Government an advantage, which, in respect to its form, is quite unusual, if not unprecedented, but which Congress undoubtedly saw suf-

ficient reason to confer. It authorizes the Court of Claims, on behalf of the United States, at any time while a suit is pending before or on appeal from said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evidence as shall satisfy the court that the Government has been defrauded or wronged. The question is what is meant by the final disposition of the suit from which the two years of limitation is to date. And it seems to us there is hardly room for a doubt. Looking at the words in their collocation with the previous words, it seems evident that the final determination of the suit has reference to its final determination on appeal (if an appeal is taken), or if none is taken, then to its final determination in the Court of Claims. The natural meaning of the words leads to the same conclusion. The final determination of a suit is the end of litigation therein. This can not be said to have arrived as long as an appeal is pending. Neither the existence nor the determination of the appeal interferes with the right, on the part of the Government, to apply for a new trial; and, of course, the mandate from this court can not affect it.

It has been objected that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us. But it is not. A new case must be made; a case involving fraud or other wrong practiced upon the Government. It is analogous to the case of a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud.

These remarks seem peculiarly fitted to the motions presented to the Court of Claims, which they declined to proceed with. These motions are, and of necessity

must be, motions to vacate judgments. They are made for error apparent on the face of the record in the court in which the judgments were rendered. The purpose of a bill of review for errors apparent is to have the court rendering the decree give the same relief that the appellate court might give under like circumstances. (*Prentiss* v. *Paisley*, 25 Fla., 927; *Evans* v. *Clement*, 14 Ill., 206.) And a motion for rehearing performs the same office, and such a remedy can be made effectual by these motions.

The object of these proceedings is "a naked and open daylight." In a number of cases judgments were rendered for large amounts, including interest for long periods. These judgments, principal and interest, have been paid. This court has decided (*Johnson* v. *District of Columbia*, 165 U. S., 330) that the parties were not entitled to this interest. If that part of the judgments is vacated, the defendants can recover those moneys. If the Court of Claims has jurisdiction, there can be no question it would correct the judgments.

And it is most proper this action should be taken in that court. The judgments, as to the interest part, are void. They might be collaterally assailed. But is it not better they should, in the manner sought, be disposed of by the court which entered them?

In *Foreman* v. *Carter* (9 Kans., 674) the judgment of foreclosure of mortgage was entered, and a sale of property made in 1863. In 1871 Carter moved to vacate said judgment because it was void for want of service. Judgment was set aside and sale adjudged void.

In *Outhwite* v. *Porter* (13 Mich., 533) the decree as to one of several defendants was set aside by the court, although he had never appeared for any purpose, because he had not been served with process.

In *Hersey* v. *Edmunds* (68 N. C., 243), which was a motion to set aside a judgment made four years after the rendition, the court said, speaking of judgments void for want of jurisdiction in the court:

> And so we conceive (if it be conceded that the judge had no power to give the judgment in vacation) this judgment might be likewise collaterally impeached and avoided, the want of jurisdiction appearing on its face, as by the amended record it would. This being so, there can be no reason why such a judgment may not be directly impeached and avoided and stricken from the records, either by the court *ex mero motu*, or at the instance of any person not interested in having it done. This was decided in *Winslow* v. *Anderson* (3 Dev. & Bat., 9), and we take it to be reasonable.

In *Pantall* v. *Dickey* (123 Penn. St.), the court said:

> If there was no lawful writ there was no jurisdiction of the alderman to entertain the case, and hence he could render no valid judgment. Of course, the judgment could have been and would have been reversed upon certiorari. But the judgment being void for want of jurisdiction to enter it, it matters not how, or in what mode, or at what time the objection on that ground is brought to the attention of a supervising court. Being void, it has no efficacy at any time. The defendant can afford to disregard it until an effort is made to enforce it. In this case a transcript was entered in the common pleas and a writ

of execution issued. Then the defendant moved to strike off the judgment, and one of the reasons assigned was the want of jurisdiction in the alderman. It was a valid reason; the facts appeared upon the record, and they were fatal to the judgment. We have frequently held that a judgment which was void upon its face may be stricken off on motion. *Allen* v. *Kripe*, 119 Pa., 1, and cases there cited.

Judgment reversed, and the rule to strike off the judgment in the court below is made absolute.

It is respectfully submitted that the matter set up in the return is not sufficient to warrant the Court of Claims in refusing to proceed with said motions, and that a peremptory mandamus should issue commanding that court to hear and determine the same.

ROBERT A. HOWARD,
United States Special Assistant Attorney.

L. A. PRADT,
Assistant Attorney-General.

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Nos. 13 & 14 Orig.

Brf. of Hoehling Ley

Office Supreme Court U.S.
FILED
JAN 23 1901
JAMES H. McKENNEY,
Clerk.

Leave.

Filed Jan. 23, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Nos. 13 and 14, Original.

EX PARTE: IN THE MATTER OF THE DISTRICT OF COLUMBIA, PETITIONER.

BRIEF IN OPPOSITION TO THE ISSUANCE OF WRITS OF MANDAMUS (FILED BY PERMISSION OF THE COURT).

BY

A. A. HOEHLING, JR.,
Attorney for Certain Parties in Interest.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-23-'01

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

Nos. 13 and 14, Original.

EX PARTE: IN THE MATTER OF THE DISTRICT OF COLUMBIA, PETITIONER.

By permission of the court the following is submitted on behalf of certain parties whose interests are directly involved herein, as below shown, in opposition to the issuance of writs of mandamus in the above-entitled causes:

STATEMENT.

The petition in the above-entitled cause, No. 13, original, sets forth, in substance, that the Court of Claims entered judgment in favor of Thomas Kirby June 10, 1895, in the sum of $4,480.52, due and payable as of date January 1, 1876, under the provisions of the two acts of Congress of June 16, 1880 (*21 Stats., 284*), and February 13, 1895 (*28 Stats., 664*). No motion for new trial was made, as authorized by the provisions of said acts; no appeal was taken; the judgment (principal and interest) was *paid*, and it was not until more than one year thereafter that motion for new trial was filed on behalf of the defendant.

In case No. 14, original, substantially the same facts are involved, except in that case the claimants were Henry L. Cranford and Lindley M. Hoffman; the judgment was for $7,385.60, due and payable as of date January 1, 1876; the defendant first filed application for appeal, but subsequently voluntarily withdrew the same, and the judgment (principal and interest) was *paid*, more than a year prior to the filing of motion for new trial.

BRIEF.

From the above recital it will appear that in each of said cases a *final* judgment was rendered in favor of the respective claimants; that the defendant, waiving its right to file motion for new trial or to prosecute appeal to this court, elected to accept each of said judgments as final and to abide by and pay the same, and thus the judgments became absolutely final and conclusive, unreversed, and unappealed, and were actually satisfied and paid by the defendant more than a year prior to the filing of motions for new trial now under review.

It seems that about a year after the satisfaction and payment of said judgments this court, in the case of Johnson *vs.* District of Columbia (*165 U. S., 330*), involving the same law under which the judgments in the present cases had been rendered, decided that it was not proper to allow interest on the amount found to be due prior to the date of the act of February 13, 1895, and so in the Johnson case the judgment of the Court of Claims was reversed to the extent of the allowance for interest.

It thus appearing to the District of Columbia that had it prosecuted appeals in the other of said District cases (including the two involved herein) those judgments might have been, to that extent, modified, it thereupon filed the present motions, alleging that great wrong and injustice had been done to the District of Columbia because of the *error* of the Court of

Claims, and it endeavored to sustain those motions under section 1088 of the Revised Statutes.

I.

CONCLUSIVE EFFECT OF FINAL JUDGMENT OF COURT OF CLAIMS.

The Court of Claims has jurisdiction of cases and to render judgments therein only by virtue of acts of Congress granting such jurisdiction (De Groot *vs.* U. S., *5 Wall., 419*).

There is attached to the final judgments of that court a *conclusiveness* which the common law ascribes to the final judgment of all courts of competent jurisdiction (Spicer's case, *5 C. Cls., 34*).

II.

SECTION 1088, R. S. U. S., HAS NO APPLICATION TO THE MOTIONS FOR NEW TRIAL EMBRACED HEREIN.

Said section 1088 provides as follows:

"The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, *upon such evidence*, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

That section, as will be observed from a mere reading, contemplated that cases might arise where a judgment had been entered against the United States, but within said period of two years, and *before* payment, *evidence* has been discovered which shows such judgment to be either a fraud,

wrong, or injustice, *in matter of fact*, as against the defendant, and where common justice and right require that the same be corrected. It is also equally apparent that that section did not contemplate that such motion for new trial should be based upon an allegation only that a judgment theretofore rendered, and which had become absolutely final and conclusive and actually satisfied and paid, was *erroneous in law* merely because in some other and subsequent, but similar, case this court had decided the law to be different from the construction placed upon it by the Court of Claims.

The relief contemplated was clearly in respect of *matters of fact*, whereby some fraud, wrong, or injustice has been done the defendant. It clearly authorizes the granting of such motion only upon *evidence*, cumulative or otherwise (*Ex parte* McKay, *30 C. Cls., 1–5*). Here the contention of defendant is that by a decision of this court, rendered in another case, more than a year after these judgments had been rendered and *paid*, it appears that said former judgments were erroneous *in matter of law*.

It has been decided, however, that resort to said section 1088 cannot be had to perform the office of an appeal; and, further, that mere error of law, where the right of appeal existed, is not a fraud, wrong, or injustice within the meaning of said section.

In Ealer's case (*5 C. Cls., 708*), the syllabus correctly states what was decided, as follows:

"Under the act of June 25, 1868 (15 Stats., 75), which authorizes the Court of Claims to grant a new trial where 'fraud, wrong or injustice in the premises has been done to the United States,' *it cannot be held that fraud, wrong or injustice has been done by an error of law when there existed an ample measure of redress by appeal.* The inconveniences of an appeal constitute no ground for the motion, and the failure to appeal, or to prosecute an appeal, under a misapprehension of their legal rights, must be deemed the defendant's misfortune."

And in the opinion it is stated:

"The judgment in this case was deliberately considered by the court after its merits had been elaborately argued by counsel. If the court committed an error of law, the defendants had a sufficient remedy, by an appeal to the Supreme Court. If an error of fact was committed, arising from inadvertence or mistake, the court was willing to correct its oversight. But the motion now made is grounded on a supposed error of law, or rather *upon a decision of the Supreme Court pronounced in another case since the judgment in this case was rendered.*"

It must be perfectly apparent that the motions for a new trial now under consideration were resorted to merely and only to perform the office of an *appeal* to correct alleged errors of law, and that they do not come within the class of new trials contemplated and provided for in said section 1088, which can only be granted—

"*Upon such evidence*, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done."

This is conclusively shown by the motions herein, which ask a new trial for the reasons:

"I. *For error of the court*, in this, that the court gave judgment for claimant * * * as due and payable January 1, 1876; the effect of which was to give interest upon the amount of said judgment from that date, whereby great wrong and injustice was done," etc.

"II. *For error of the court*, in adjudging that the amounts allowed became due and payable before the granting of the judgment herein, whereby wrong and injustice was done," etc.

See Petitions, Original, No. 13, p. 6; No. 14, pp. 6, 7.

It must, therefore, result that these motions cannot be sustained under said section 1088.

III.

THE ACT OF JUNE 16, 1880, AS ENLARGED AND EXTENDED BY THE ACT OF FEBRUARY 13, 1895, UNDER WHICH THE JUDGMENTS HEREIN WERE RENDERED, REQUIRES ALL MOTIONS FOR NEW TRIALS TO BE MADE, BY EITHER PARTY, WITHIN TWENTY DAYS AFTER RENDITION OF JUDGMENT.

Under the rules and practice of this court, motions for new trial (other than those filed under § 1088, *supra*) must be filed at the term in which judgment is rendered.

The act of June 16, 1880 (*21 Stats., 285*), providing for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on this court to hear the same, gave to the District of Columbia the same power to interpose counter-claims and offsets against claims, and defenses for fraud practiced or attempted, and all other legal defenses, and with like power of appeal as in cases against the United States tried in said court; and further provided that all laws in force relating to prosecution of claims against the United States in said court should apply, so far as applicable, to the prosecution, practice, hearing, and determination of claims against the District of Columbia authorized to be prosecuted under said act, and then added the express proviso: "*That motions for new trials shall be made by either party within twenty days after the rendition of any judgment*" (§§ 3 and 4).

The jurisdiction so conferred by this act was subsequently enlarged and extended by the act of February 13, 1895 (*28 Stats., 664*), which authorized said court to allow in said cases the rates established and paid by the Board of Public Works, and added that whenever said rates shall not have been allowed, the claimant shall be entitled, on motion made within sixty days after the passage of the act, to a new trial of such cause.

The jurisdiction thus conferred by these two acts being *special*, to be exercised only in the manner and to the extent therein limited, and having, in no uncertain terms, provided, "That motions for new trials *shall be made by either party within twenty days* after the rendition of any judgment" (*supra*), it would seem clear that said § 1088, so far as it authorizes motions for new trial to be filed within two years after the rendition of judgment, has no application whatever to said District cases, and that the only motions for new trial therein authorized should be filed, if at all, within said period of twenty days.

In the case of Childs *vs.* D. C. (*19 C. Cls., 332, 334, '5*) it was expressly held that the combined effect of the two provisions of law, namely, section 1088, Revised Statutes of the United States, and section 4 of the act of June 16, 1880, is to authorize the District of Columbia—

"'within twenty days after the rendition of any judgment against it,' to move for a new trial on the same grounds that the United States might present under the section 1088 of the Revised Statutes."

The motions for new trial here under consideration were filed more than a year after the rendition of judgment, and they therefore cannot be sustained.

IV.

THE WRIT OF MANDAMUS WILL NOT BE GRANTED IN CASES WHERE, IF ISSUED, IT WOULD PROVE UNAVAILING.

This is a fundamental principle of the law of mandamus, and may properly be applied in the present case, even should the court be of opinion that the present motions for a new trial were filed within the time limited by law.

The application of the principle just stated will be found in the following:

(*a.*) The payment of judgment is a waiver and release of all errors, and is irrevocable discharge.

As stated by the Court of Claims in Russell's case (*15 C. Cls., 168*), speaking of a judgment which had been paid:

"It is all dead, and no mere motion by either party can resuscitate it in the least degree."

The authorities are abundant upon this proposition, and as the present petitions for mandamus disclose the voluntary payment of these judgments long prior to the filing of motions for new trial, thereby, in legal effect, waiving and releasing errors, the judgments are dead and cannot be resuscitated. Hence, under such circumstances, mandamus, if issued, would be fruitless.

(*b.*) The jurisdiction of the Court of Claims, in respect of District of Columbia cases, founded upon the act of February 13, 1895, was taken away by the repealing act of March 3, 1897, and hence that court no longer has any power to further proceed in said cases.

This court, *In re* Hall (*167 U. S., 38, 43*), speaking of the effect of said repealing act, stated:

"The repeal of the act took away all jurisdiction in the Court of Claims to proceed further, so far as concerned any rights founded upon the acts so repealed."

That mandamus will not be awarded under such circumstances, see Commonwealth, *ex rel.*, etc., *vs.* Commissioners (*6 Pick., 500*).

It thus appears that the granting of the writs of mandamus prayed for in these cases would be unavailing and fruitless, *first*, because the District of Columbia has waived and released all errors by voluntarily electing to abide by

and perform the judgments, which it did by paying the same; and, *second*, the repealing act just referred to has deprived the Court of Claims of all jurisdiction to further proceed in respect of the cases so founded upon the act of February 13, 1895, in which latter class are embraced the cases here under consideration.

For all of the foregoing reasons, it is respectfully submitted that the writs of mandamus should not issue.

A. A. HOEHLING, JR.,
Attorney for Thomas Kirby et al.

WASHINGTON, D. C., *January* 23, 1901.

No. 13 Orig.

Return to rule.

Filed December 5, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 13, Original.

EX PARTE: IN THE MATTER OF THE DISTRICT OF COLUMBIA, PETITIONER.

RETURN TO RULE.

FILED DECEMBER 5, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 13, Original.

EX PARTE: IN THE MATTER OF THE DISTRICT OF COLUMBIA, PETITIONER.

RETURN TO RULE.

COURT OF CLAIMS.

In the matter of the petition of the District of Columbia for a writ of mandamus in the case of Thomas C. Kirby *v.* said District, decided in the Court of Claims on the 10th day of June, 1895, in which a judgment was rendered against said District on said day.

To the Supreme Court of the United States:

The chief justice and judges of the Court of Claims, in answer to a rule of the Supreme Court, made on the 28th day of May, 1900, to show cause why a writ of mandamus should not issue as prayed for, answering, say: That on the 25th day of February, 1897, the petitioner filed a motion for a new trial as set forth in the petition herein, and on the 19th day of March, 1900, the matter then having been brought to the notice of the court, after argument and consideration by the court, said motion was overruled by the court in an endorsement on the same, as follows, to wit:

"Overruled, the court having no jurisdiction to consider the same. The statute under which the suit was brought requires motions for new trials to be made within twenty days from the rendition of the judgment, as follows: 'That motions for new trials shall be made by either party within twenty days after the rendition of any judgment. (Act of June 16, 1880, 21 Stat. L., 285.)'"

In testimony whereof the chief justice and judges have hereunto set their hands this 30th day of November, A. D. 1900.

[SEAL.]

CHARLES C. NOTT.
LAWRENCE WELDON.
STANTON J. PEELLE.
CHARLES B. HOWRY.

(Endorsed:) Supreme Court, U. S. October term, 1900. Term No., 13, original. Ex parte: In the matter of the District of Columbia, petitioner. Return to rule. Filed Dec. 5, 1900.

10752—00

No. 14 Orig.

Return to rule.

Filed December 5, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 14, Original.

EX PARTE: IN THE MATTER OF THE DISTRICT OF COLUMBIA, PETITIONER.

RETURN TO RULE.

FILED DECEMBER 5, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 14, Original.

EX PARTE: IN THE MATTER OF THE DISTRICT OF COLUMBIA, PETITIONER.

RETURN TO RULE.

COURT OF CLAIMS.

In the matter of the petition of the District of Columbia for a writ of mandamus in the case of Cranford and Hoffman *v.* said District, decided on the 18th day of November, 1895, in which a judgment was rendered against said District on said day.

To the Supreme Court of the United States:

The chief justice and judges of the Court of Claims, in answer to a rule of the Supreme Court, made on the 28th day of May, 1900, to show cause why a writ of mandamus should not issue as prayed for, answering, say: That on the 25th day of February, 1897, the petitioner filed a motion for a new trial, as set forth in the petition herein, and on the 19th day of March, 1900, the matter then having been brought to the notice of the court, after argument and consideration by the court, said motion was overruled by the court in an indorsement on the same, as follows, to wit:

"Overruled: The court having no jurisdiction to consider the same. The statute under which the suit was brought requires motions for new trials to be made within twenty days from the rendition of the judgment, as follows: 'That motions for new trials shall be made by either party within twenty days after the rendition of any judgment. (Act of June 16, 1880; 21 Stat. L., 285.'"

In testimony whereof the chief justice and judges have hereunto set their hands this 30th day of November, A. D. 1900.

[SEAL.]

CHARLES C. NOTT.
LAWRENCE WELDON.
STANTON J. PEELLE.
CHARLES B. HOWRY.

(Indorsed): Supreme Court U. S., October term, 1900. Term No. 14, Original. Ex parte: In the matter of the District of Columbia, petitioner. Return to rule. Filed Dec. 5, 1900.

10753—00

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 13, Original. In re The District of Columbia, Petitioner.
No. 14, Original. In re The District of Columbia, Petitioner.

[February 11, 1901.]

Mr. Chief Justice FULLER delivered the opinion of the Court:

These are petitions for mandamus. The petition in No. 13 sets forth in substance that the Court of Claims rendered judgment in favor of Thomas Kirby and against the District, June 10, 1895, due and payable as of January 1, 1876, under the provisions of two acts of Congress, of June 16, 1880, 21 Stat. 284, c. 243, and of February 13, 1895, 28 Stat. 664, c. 87. No motion for new trial was made and no appeal was taken, and the judgment, principal and interest, was paid.

From the petition in No. 14, it appears that Henry L. Cranford and Lindley M. Hoffman obtained judgment November 15, 1895, under the aforesaid acts, payable as of January 1, 1876, which, principal aud interest, was paid. No new trial was asked for, but an application for an appeal was made and withdrawn.

February 15, 1897, on an appeal by the District of Columbia from similar judgments in favor of other claimants, this court decided that no interest was recoverable on the amounts claimed until from the passage of the act of February 13, 1895. *District of Columbia* v. *Johnson*, 165 U. S. 330. Thereupon on February 25, 1897, the District filed motions for new trial in the cases involved here under section 1088 of the Revised Statutes, brought forward from the act of June 25, 1868, (15 Stat. 75, c. 71,) which provides: "The Court of Claims, at any time when any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of the judgment, the same shall be payable and paid as now provided by law."

The ground of these motions was error in the allowance of interest from January 1, 1876, or except from the date of the judgments. The motions were denied for want of jurisdiction.

The act of June 16, 1880, provided for the settlement of all outstanding claims against the District of Columbia, including claims arising out of contracts made by the board of public works, and conferred jurisdiction on the Court of Claims to hear the same, applying all laws then in force relating to the prosecution of claims against the United States, and giving the District of Columbia the same right to interpose counterclaims and defenses, and a like power of appeal, as in cases against the United States tried in said court, and containing the express proviso that "motions for new trials shall be made by either party within twenty days after the rendition of any judgment." The jurisdiction so conferred was afterwards enlarged by the act of February 13, 1895, which authorized the court to allow on claims like these the rates established and paid by the board of public works, and added that whenever those rates had not been allowed in prior cases, the claimants should be entitled on motion made within sixty days after the passage of the act to a new trial thereof.

Applications for leave to file petitions requiring the judges of the Court of Claims to show cause why writs of mandamus should not be issued directing them to hear, try and adjudge the motions for new trial, having been presented to this court, leave was granted, and rules to show cause were entered thereon, to which the respondents made answer that the motions were overruled because the court had no jurisdiction to consider the same, as the statute required motions for new trials to be made within twenty days after the rendition of judgment.

In *Ealer's Case*, 5 Ct. Cl. 708, it was ruled that under the act of June 25, 1868, now section 1088 of the Revised Statutes, it could not be held that fraud, wrong or injustice had been done by an error of law when there existed an ample measure of redress by appeal, and Nott, J., delivering the opinion, said: "The judgment in this case was deliberately considered by the court after its merits had been elaborately argued by counsel. If the court committed an error of law, the defendants had a sufficient remedy, by appeal to the Supreme Court. If an error of fact was committed, arising from inadvertence or mistake, the court was willing to correct its oversight. But the motion now made is grounded on a supposed error of law, or rather upon a decision of the Supreme Court, pronounced in another case since the judgment in this was rendered."

We concur in this view. It seems to us clear that the relief contemplated by section 1088 was in respect of matters of fact whereby some fraud, wrong or injustice had been done to defendants. Indeed the section provides that such new trials shall be granted "upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises had been done." *Ex parte Russell*, 13 Wall. 664; *Belknap* v. *United States*, 150 U. S. 588, 591. This being so, it is unneces-

sary to consider whether the twenty day limitation of the act of 1880 operated in amendment of section 1088, for that section does not authorize motions for new trial on the grounds upon which those in question rested. As the Court of Claims was right in denying the motions, the rules hereinbefore granted must be discharged and the petitions dismissed, and it is

So ordered.

Mr. Justice HARLAN concurred in the result.

True copy.

Test:

Clerk Supreme Court, U. S.